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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO**

ANIBAL RODRIGUEZ, et al., individually and
on behalf of all others similarly situated,

Plaintiffs,

vs.

GOOGLE LLC,

Defendant.

Case No. 3:20-cv-04688-RS

**DEFENDANT GOOGLE LLC'S
OPPOSITION TO PLAINTIFFS' MOTION
FOR RELIEF FROM CASE
MANAGEMENT SCHEDULE**

The Honorable Richard Seeborg

Date: December 9, 2021

Time: 1:30 p.m.

Place: Courtroom 3 - 17th Floor

Action Filed: July 14, 2020

Trial Date: Not Yet Set

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1 **I. INTRODUCTION**

2 Plaintiffs’ motion tells a story that never happened. Plaintiffs’ retelling of the parties’
3 discovery efforts goes to great lengths to disguise Plaintiffs’ halfhearted approach to litigating this
4 case, and the inescapable conclusion that their case suffers from a fatal legal defect, prompting
5 this last-minute plea to cast a dragnet across Google for anything that might save their claims. The
6 legal standard for this motion takes only one thing into account: Plaintiffs’ diligence in attempting
7 to abide by the Court’s discovery deadline. By that yardstick, Plaintiffs fall far short of meeting
8 their burden to justify a case extension.

9 Despite the *sturm und drang* about purportedly unfinished business, the most important
10 fact here is that **no** outstanding discovery order exists requiring Google to produce any document
11 or disclose any information that Google has not already complied with. Indeed, in lieu of pursuing
12 their right to relief before Judge Tse, Plaintiffs lay a litany of complaints at this Court’s feet
13 without asking for relief in any forum for the purported deficiencies in Google’s discovery
14 responses. Plaintiffs cannot acquiesce to Google’s objections and positions in discovery, and then
15 turn around and accuse Google of gamesmanship near the close of discovery, seeking more time
16 for discovery they had ample opportunities to take.

17 Regardless, with adequate diligence, Google and Plaintiffs can complete discovery by the
18 February 10 discovery cut-off. Depositions can proceed later this month or in early December. So
19 can Google’s Rule 30(b)(6) deposition—a deposition that Plaintiffs moved to compel in June, but
20 that they now say they’re not ready to take. Nor, they say, can they sit for their own duly noticed
21 depositions unless Google agrees to various conditions concerning its document productions—an
22 issue Google will bring to Judge Tse’s attention if necessary.

23 Of course, if Judge Tse issues any discovery orders before this motion becomes ripe,
24 Google will re-evaluate its position, but as of now, Google is on track to complete discovery,
25 make its witnesses available for deposition, sit for a Rule 30(b)(6) deposition, and depose
26 Plaintiffs by February 10. As Google made clear to Plaintiffs before this motion was filed, if Judge
27 Tse issues any orders that would bring Google’s ability to meet the Court-ordered deadline for fact
28

1 discovery into question, it would in good faith accommodate a change to the schedule to allow the
2 time needed to comply with any such orders. Currently, no extra time is needed, and even if
3 Plaintiffs prevail on some of their discovery disputes, it is highly likely Google will be able to
4 comply before discovery closes. Any extension of the case schedule should be tailored to the
5 actual discovery that must be done, not hypothetical relief Plaintiffs hope they obtain.

6 As for Plaintiffs' accusation that Google offered and then reneged on a schedule extension,
7 that is false. Contemporaneous documentation filed with this motion demonstrates that Plaintiffs
8 tried to secure that exact promise from Google and that Google *refused* to give it, for the same
9 reason it opposes this motion now: Google can comply with its discovery obligations by the
10 discovery cut-off. In the run-up to this motion, Google repeatedly offered Plaintiffs a several-
11 weeks extension, but Plaintiffs declined the offer, arguing that nothing short of six months would
12 do.

13 Google is not trying to be difficult. But this case has been pending since mid-2020, and
14 Plaintiffs have not carried their burden to demonstrate that they are missing any discovery that
15 Google has either agreed to provide or been ordered to provide. Google has provided extensive
16 discovery into the material issues in the case, including a verified interrogatory response served
17 August 4, 2021, demonstrating that, contrary to Plaintiffs' allegations, when a user turns the Web
18 & App Activity (WAA) toggle to "off," Google respects that decision by anonymizing GA for
19 Firebase data in a manner that is not re-associated with the user's identity; and when WAA and a
20 number of other privacy settings are set to "on," Google may associate GA for Firebase data with
21 a user's Google Account, and it shows the user that it has done so.

22 Since serving its interrogatory response, Google completed document production for three
23 custodians and offered deposition dates for each of them and for the Rule 30(b)(6) deposition
24 Plaintiffs moved to compel in June. Within days of receiving that offer, Plaintiffs spun up four
25 discovery letter briefs and this motion. This Court should see this motion for what it is and deny it.

1 **II. COUNTER-STATEMENT OF FACTS**

2 **A. Google complied with its discovery obligations throughout the time its motions**
 3 **to dismiss were pending.**

4 This case was filed on July 14, 2020. Plaintiffs asked for and received the very schedule
 5 they now seek to extend on the grounds that this extended timetable for discovery is not
 6 uncommon in complex cases. ECF No. 47 at 19. Google stipulated to that schedule, and the Court
 7 set a fact discovery cut-off of November 12, 2021.

8 Google first moved to dismiss in October 2020. ECF No. 48. Rather than oppose, Plaintiffs
 9 filed a (virtually identical) amended complaint, which Google moved to dismiss in December
 10 2020. ECF No. 62. One of the central issues in that motion was whether Plaintiffs could pursue a
 11 “secret scripts” theory of the case unbounded by the specific Google Analytics (“GA”) for
 12 Firebase product that they identified in their first two complaints.

13 While the motion was pending, per this Court’s directive, Google moved ahead in
 14 discovery, producing documents and information about GA for Firebase and the Web & App
 15 Activity Control (WAA). The parties entered an ESI protocol in January 2021, ECF No. 73; that
 16 same month, Plaintiffs filed two discovery briefs seeking production of documents from regulators
 17 and a separate litigation in Arizona concerning WAA. In early February, Judge Tse granted in part
 18 and denied in part both requests. Google completed that production of over 1,000 documents on
 19 March 24 and April 2, 2021. Santacana Decl. ¶ 5. Between December 16, 2020 and February 9,
 20 2021, Google also produced thousands of “non-custodial” documents comprising documentation
 21 about GA for Firebase and WAA. *Id.* ¶ 6.

22 On February 12, Google designated three ESI custodians and it began negotiating search
 23 terms with Plaintiffs. *Id.* ¶ 7.

24 During this time period, Google refused to produce discovery *unrelated* to GA for Firebase
 25 because it believed that the secret scripts theory was fatally deficient. *Id.* ¶ 8. This Court agreed,
 26 dismissing it in May 2021. ECF No. 109 at 11–12. Google’s decision not to produce documents
 27 unrelated to GA for Firebase to enable Plaintiffs’ wild goose chase for secret scripts was therefore
 28

1 harmless to Plaintiffs; indeed, though they (unsuccessfully) pursued broad discovery into other
2 Firebase products for six months, and though they were given leave to amend by this Court to re-
3 assert a “secret scripts” theory, Plaintiffs excised that theory from their Second Amended
4 Complaint. ECF No. 113. Whatever delay the motions to dismiss had caused in producing non-
5 GA-for-Firebase documents is therefore of no moment here; to this day, Google refuses to
6 produce documents related to the “secret scripts” theory, and Plaintiffs have (rightly) never moved
7 to compel them. Santacana Decl. ¶ 8.

8 On May 4, 2021, Plaintiffs moved to compel Google to designate ten more custodians—a
9 blunderbuss motion that was not limited to the issues actually raised in this case. ECF No. 105.
10 Judge Tse denied that motion on the same day it was filed and ordered Plaintiffs to review
11 Google’s custodial ESI production before coming back for more custodians (the idea being that
12 reviewing Google’s productions would help Plaintiffs select a slate of custodians targeted to the
13 issues in the case, not a list of ten people who Plaintiffs speculated might be relevant based on
14 their LinkedIn profiles. ECF No. 106. Plaintiffs also moved, on June 1, to compel a Rule 30(b)(6)
15 deposition concerning the data flow related to GA for Firebase. Judge Tse denied the motion on
16 June 4 as premature and permitted Plaintiffs to “re-notice these topics after Google substantially
17 completes production of the topic-related documents.” ECF No. 111 ¶ 1.

18 Plaintiffs filed their Second Amended Complaint on June 11, 2021. In place of the secret
19 scripts theory, Plaintiffs identified two GA for Firebase integrations that they believe are relevant
20 to their claims: the “AdMob and Firebase” integration, and the Firebase Cloud Messaging
21 integration. Google moved to strike or dismiss Plaintiffs’ references to those products on the
22 grounds that their allegations fell below the Rule 8 standard. As that motion was pending, Google
23 refused to produce documents related to AdMob and Cloud Messaging, since its motion could
24 have disposed of those products from the case. Santacana Decl. ¶ 9.

25 On July 8, Google began producing custodial ESI from the three designated custodians
26 according to search terms it disclosed to Plaintiffs. *Id.* ¶ 10.

B. Plaintiffs sought but did not receive a promise from Google to extend the case schedule six months.

On July 9, counsel for Plaintiffs and counsel for Google met and conferred concerning Plaintiffs' request for an extension of the case schedule. Santacana Decl. ¶ 11. Plaintiffs' counsel requested a 180-day extension on the grounds that Google was refusing to produce documents related to AdMob and Cloud Messaging. *Id.* Google's counsel agreed to relay the request to Google. *Id.* The parties discussed an extension of the case schedule again on July 22. *Id.* ¶ 12. During that call, as contemporaneous communications indicate, Google's counsel relayed to Plaintiffs' counsel that Google would not agree to a 180-day extension. *Id.* Plaintiffs had only introduced AdMob and Cloud Messaging to the case a month earlier, and there was no reason to believe such an extension would be necessary. *Id.* Nevertheless, since the time period between the filing of the Second Amended Complaint introducing AdMob and Cloud Messaging and the expected date of this Court's Order deciding the motion to dismiss added up to a few months, Google agreed to extend the fact discovery cutoff until January 11. *Id.* Further, Google agreed to consider any further extension of the case schedule after the Court ruled on the motion to dismiss. *Id.* ¶ 13.

At no time did Google promise to agree to any further extension of the case schedule. *Id.* ¶ 13. Indeed, in Plaintiffs' first draft served August 5 of a stipulation extending the case schedule to January 11, Plaintiffs wrote: "the parties agree to negotiate a second extension as needed after the Court has issued an order on the pending motion to dismiss." *Id.* ¶ 14. In a redline served August 9, Google excised that language and replaced it with: "the parties agree to negotiate in good faith whether and to what extent a second extension may be needed after the Court has issued an order on the pending motion to dismiss." *Id.* Plaintiffs responded to that redline: "[Y]our edits are good with us," and filed Google's version. *Id.*; see ECF No. 126.

C. Plaintiffs had ample opportunity to take discovery and to seek an extension of the case schedule if they needed it.

This Court issued its ruling on Google's motion to dismiss the Second Amended Complaint on August 18, just over two months after the first time Plaintiffs accused AdMob and Cloud Messaging. ECF No. 127. In the wake of that ruling, Plaintiffs did not raise the question of

1 a schedule extension again, despite the Court’s Order. Santacana Decl. ¶ 15. Since Google
 2 opposed any further extension, it likewise did not address the issue again. *Id.* ¶ 16. It did move to
 3 dismiss Plaintiffs’ Third Amended Complaint, but not as to AdMob and Cloud Messaging; that
 4 motion is pending, but Google has not withheld documents related to Plaintiffs’ claims in light of
 5 the pending motion. *Id.* ¶ 17.

6 After further requests for search terms from Plaintiffs, Google continued producing
 7 documents through September 8, 2021, well in advance of the then-scheduled fact discovery cut-
 8 off of January 11, 2022. *Id.* ¶ 18. Google communicated that it had completed custodial ESI
 9 production for Messrs. Ma, Ganem, and Monsees on September 9. *Id.* ¶ 18. In response, Plaintiffs
 10 asked for a third slate of search terms to be used. *Id.* ¶ 19. Rather than provoke motion practice,
 11 Google agreed to the bulk of those terms, too, and completed productions for the three custodians
 12 in late October and early November. *Id.* ¶ 19. Since then, Plaintiffs asked for a *fourth* slate of
 13 search terms, and Google, in the interest of compromise, again offered to complete production
 14 using those terms by the end of November, leaving almost two months for depositions for those
 15 three custodians. *Id.* ¶ 21.

16 Meanwhile, even though AdMob and Cloud Messaging were subject to a motion to
 17 dismiss, Google made preparations to produce documents concerning those products
 18 expeditiously. *Id.* ¶ 20. Google designated a custodian for each product in October and it prepared
 19 to run similar search terms across their ESI. *Id.* Given the Court’s ruling on the Second Amended
 20 Complaint, Google moved ahead with reviewing these documents, and it completed production of
 21 the custodial ESI for Messrs. Weng and Hansen for all agreed-upon search terms on November
 22 12, 2021. *Id.* Google also produced non-custodial documents relating to AdMob and Cloud
 23 Messaging responsive to Plaintiffs’ document requests. *Id.* ¶ 20.

24 **D. Plaintiffs are seeking a schedule extension because they haven’t been diligent.**

25 In early October, given Google’s progress with document production and in light of
 26 Plaintiffs’ earlier motion to compel a Rule 30(b)(6) deposition concerning the data flow for GA
 27 for Firebase, Google—unprompted—offered dates in early November for the Rule 30(b)(6)
 28 deposition and for Messrs. Ganem, Ma, and Monsees. *Id.* ¶ 22. That e-mail, sent October 12,

2021, unleashed a torrent of activity from Plaintiffs. After months of inactivity, Plaintiffs: (1) served four letter briefs seeking 19 new custodians, more search terms, greater log preservation, and a privilege decision on a single document Google clawed back after it was inadvertently produced; (2) moved to continue the case schedule; and (3) refused to take the Rule 30(b)(6) deposition that they had moved to compel in June 2021. *Id.* ¶ 23–31.

Of particular relevance to Plaintiffs’ claim that Google engaged in gamesmanship, it was not until October 21, sixty-four days after this Court’s ruling on the motion to dismiss the Second Amended Complaint, and just two months before the close of fact discovery (that include the holidays), and only after Google announced completion of its ESI production and offered dates for depositions before the January 11 fact discovery cutoff, that Plaintiffs first re-raised the question of a case schedule extension. *Id.* ¶ 27. Since Google was on track to complete all fact discovery by January 11, it declined to agree to such an extension, but it did offer an extension “on the order of weeks” as a courtesy if Plaintiffs believed they needed a month or so extra to complete discovery on their end. *Id.* Plaintiffs declined that proposal. *Id.* There can be no basis to conclude that Plaintiffs were confused about Google’s position on a case schedule extension. As Google explained repeatedly, more time begets more discovery, whether it’s merited or not. From Google’s perspective, it has provided appropriate discovery and complied with all discovery orders, so no more time should be needed.

E. Google provided extensive discovery into the material issues in dispute.

1. Google has complied with all of its document production obligations.

Google has made twenty-three separate document productions. Santacana Decl. ¶ 32.. By February 19, 2021, it had produced several thousand documents detailing the documentation relating to GA for Firebase and Google’s disclosures related to WAA and its privacy policies. *Id.* ¶ 6. Google also made several major custodial productions using search terms proposed by Plaintiffs on July 8, August 30, and September 8, 2021, from the files of Messrs. Ma, Ganem, and Monsees, totaling several thousand more documents. *Id.* ¶¶ 10, 18. In response to those productions, Plaintiffs proposed another slate of search terms, and Google ran the bulk of those as

1 well, prompting a production of almost 1,000 more custodial documents in October. *Id.* ¶ 19.
 2 Google also ran more search terms for AdMob custodian Ed Weng and Cloud Messaging
 3 custodian Todd Hansen, generating another production of 531 documents on November 12, 2021.
 4 *Id.* ¶ 20.

5 Finally, Plaintiffs proposed yet another slate of search terms aimed specifically at AdMob
 6 and Cloud Messaging, and the parties reached compromise on the bulk of those as well. *Id.* ¶ 21.
 7 Google is reviewing those search term hits now and will complete production of the custodial
 8 documents on a rolling basis well in advance of the discovery cut-off.
 9 *Id.* ¶ .

10 In all, Google used hundreds of search terms to target relevant and responsive documents.
 11 In Google and defense counsel's experience, this slate of search terms is remarkably long, well
 12 targeted, and highly likely to reach almost any document of relevance in the custodians' files.

13 There are no outstanding discovery orders with which Google has not yet complied. *Id.* ¶
 14 33. Plaintiffs have asked Judge Tse to order additional custodians, and they plan to ask Judge Tse
 15 to order more expansive search terms, but as of today, no such order has been issued, and Google
 16 will not presume to pre-judge the outcome. Nevertheless, Google plans to update the Court with
 17 an estimate of when it can complete any further document discovery ordered by Judge Tse.

18 **2. Plaintiffs' discovery complaints are irrelevant and meritless.**

19 Google has complied with all of Judge Tse's orders. Plaintiffs are moving for a
 20 continuance based on their prediction that Judge Tse will award them expansive new discovery.
 21 But that prediction may or may not come true, and the analysis of this Court should hew solely to
 22 the discovery issues that have actually been presented to the Court.

23 For example, Plaintiffs have neither served nor filed any discovery motion concerning
 24 Google's privilege log, the Rule 30(b)(6) deposition negotiations, the production of source code,
 25 or for further document production with respect to any particular Request for Production.¹

26
 27 ¹ In a draft CMC statement served on November 10, Plaintiffs indicated for the first time their
 28 intention to file more discovery motions, including with respect to source code and Google's
 privilege log. As of today, Google is unaware of the basis for those motions, the parties have not

Nevertheless, each of these complaints is wholly meritless:

- Plaintiffs are in possession of Google’s privilege log, which covers all documents withheld for privilege to date. Google served it by the date the parties agreed on, on November 2 (the parties had agreed on the end of October, which fell on a weekend, and subsequently agreed on November 2). *Id.* ¶ 34.
- Google has offered the Rule 30(b)(6) deposition Plaintiffs moved to compel in June, and it offered to provide a deposition in response to a more fulsome deposition notice. Google only asked that Plaintiffs serve that notice in a timely manner so that individuals need not testify twice as a result of piecemeal deposition notices. Plaintiffs ultimately agreed to that approach, and they plan to serve their comprehensive notice shortly. Google will then designate deponents for depositions in December and January.
- Google has never agreed to produce source code. *Id.* ¶ 35. But, if the goal is to understand Google’s technology, Google has: produced non-public documentation about the functionality of GA for Firebase; served a detailed interrogatory response detailing how the product works and how it does, in fact, respond to a user’s WAA setting; and offered a Rule 30(b)(6) deposition notice so Plaintiffs can have answered any lingering questions about how the product works. *Id.* ¶ 36. In this case, there is no compelling need to produce source code, and Plaintiffs have never moved to compel it, making their complaint on this score irrelevant, too.
- Though Plaintiffs complain that “there are also several RFP-specific discovery disputes,” which the motion does not specify, Google is not aware of any RFP-specific dispute that Plaintiffs intend to bring to Judge Tse.

The remaining complaints about discovery in the Motion relate to pending or about-to-be-pending disputes before Judge Tse. Those complaints are also meritless, for the reasons discussed in Google’s portions of the letter briefs on each one. The custodian letter brief has already been filed, ECF No. 155, and Judge Tse ordered supplemental briefing, ECF No. 157. The log preservation brief has also been filed. ECF No. 167. The letter brief concerning the “clawback issue” and the search-term letter brief will likely be filed next week. In the latter, Google will oppose Plaintiffs’ inappropriate request that Google search every document in each custodians’ possession relating to the product on which they primarily work, *e.g.*, searching WAA for Dave Monsees or “Cloud Messaging” for Todd Hansen. Such an approach is unlikely to yield further

had the required videoconference to discuss them, and Plaintiffs have not served their portion of any such motion on Google.

1 responsive documents given the extensive and well-targeted search terms Google has already run,
 2 but it will yield massive numbers of documents for Google to review, since Dave Monsees is
 3 likely to have as many documents with the term “WAA” in them as this Court is likely to have
 4 documents with the term “complaint” in them. It’s a needle-in-a-haystack request, and it is wholly
 5 disproportionate to the issues in dispute.

6 **3. Plaintiffs grossly mischaracterize non-public documents about WAA in**
 7 **their motion, as they have throughout this case.**

8 Plaintiffs have identified documents in which Google product managers and engineers
 9 discuss whether different aspects of WAA not at issue here are confusing to users. Plaintiffs have
 10 steadfastly relied on these documents (many of which came from other litigations) in their
 11 complaints and in briefs to this Court to try and drum up a negative impression of Google and of
 12 the WAA control. These attempts are disingenuous. This Court can ignore these documents
 13 completely, since they have nothing to do with the legal question presented by this motion. But
 14 because Plaintiffs insisted on providing them to the Court and discussing them at length, Google
 15 provides a response here concerning each document for the Court’s benefit, should it be curious.

16 Mao **Exhibit A** is an internal discussion about a newspaper article. Plaintiffs’ motion says
 17 the e-mail relates to an “article concerning *Google’s data collection while WAA is turned off.*”
 18 Mot. at 6:22 (original emphasis). That is false. The article and the discussion are about
 19 functionality when the *Location History* control is turned “off” while the WAA control is turned
 20 “on.” The Location History/WAA question is far afield of this case and would require a mini-trial
 21 just to analogize it to Plaintiffs’ claims here.

22 **Exhibit B** is an old chestnut of Plaintiffs’, but they deeply misunderstand it; The engineer
 23 opined that the feature would increase joinability risks, *i.e.*, the risk that someone at Google could
 24 accidentally or purposefully re-associate pseudonymous data with a user’s identity against the
 25 user’s wishes. This is also evident from **Exhibit E**, relating to the same issue; in it, the original
 26 question is reproduced—a request for “mitigations” to prevent inadvertently creating joinability
 27 risks. Exhibits B and E are evidence that Mr. Ganem and his team are focused on *mitigating*
 28 joinability risks, not exploiting them.

1 In **Exhibit C**, a senior Google employee who does not work on WAA raises questions
 2 about what happens when WAA is turned off, knowing that Google can still receive some types of
 3 user data in some form. Mr. Monsees explains that when WAA is off, the data is “never associated
 4 with an identity,” so the employee’s concerns are unfounded. Far from a smoking gun for
 5 Plaintiffs, this is, if anything, more evidence that Google honors user privacy controls. **Exhibit D**
 6 is more of the same e-mail thread.

7 **Exhibit F** has nothing to do with this case. It is a performance self-evaluation, and
 8 Plaintiffs appear to rely on it to discuss an irrelevant Google effort regarding user consents and
 9 controls. The portions of Exhibit F on which Plaintiffs rely demonstrate the efforts Google has
 10 made to ensure that users consent to the collection of their data, and to honor their decisions when
 11 they opt out of such collection or usage.

12 **III. ARGUMENT**

13 There is no unfinished business in this case that cannot be completed by the fact discovery
 14 cut-off. Google is wrapping up its outstanding document productions now, it has offered
 15 deposition dates for itself and its witnesses, and it has noticed Plaintiffs’ depositions. All those
 16 depositions can happen in the next three months without any rushing or jamming of anyone. As
 17 this case stands today, Plaintiffs have not secured any relief from this Court that would justify
 18 expanding the case schedule. And in any case, to the extent they do secure such relief in the
 19 future, it should be Google’s motion to expand the case schedule to allow it time to comply with
 20 discovery orders, not Plaintiffs’, since it is Google who is best positioned to estimate how much
 21 time it needs to fulfill its discovery obligations.

22 The Motion provides a single basis for extending the fact discovery cut-off: that Plaintiffs
 23 wish to take more discovery than can be done in the remaining three months of the discovery
 24 period. But their estimate is based purely on speculation about how Judge Tse might rule on late-
 25 breaking motions to compel on discovery disputes Plaintiffs have known about for months or even
 26 since the start of this case; and most of those motions have not even been served on Google, much
 27 less filed. It wasn’t until two days ago that Plaintiffs indicated for the first time their intention to
 28

1 move to compel Google to produce source code, even though Google long ago refused to produce
 2 it. Plaintiffs' complaints about Google's preservation of user data likewise is an issue that has
 3 stagnated since the Rule 26 conference; Plaintiffs have always known that Google would not
 4 preserve hundreds of billions of entries of raw event-level data for this case and chose to remain
 5 silent about it until now. The list goes on. What matters for now is that Google is in compliance
 6 with all outstanding discovery orders. Plaintiffs do not claim otherwise. Countless courts in this
 7 precise situation have denied leave to exceed the discovery cut-off. This Court should, too.

8 **A. Plaintiffs' motion misstates the legal standards; they bear the burden to show**
 9 **diligence, and their lack of diligence is inquiry-ending.**

10 Plaintiffs' request for a stay of the fact discovery cut-off is subject to the Rule 16(b) good
 11 cause standard, which "primarily considers the diligence of the party seeking the amendment."
 12 *Hill v. Goodfellow Top Grade*, No. 18-CV-01474-HSG, 2019 WL 2716487, at *2 (N.D. Cal. June
 13 28, 2019). Plaintiffs bear the "burden to show that [they] acted diligently to comply with the
 14 Court's deadline but [were] unable to comply because of the development of matters which could
 15 not have been reasonably foreseen or anticipated at the time of the Rule
 16 16 scheduling conference." *Jacobson v. Persolve, LLC*, No. 14-CV-00735-LHK, 2015 WL
 17 2061712, at *3 (N.D. Cal. May 1, 2015). "[C]arelessness is not compatible with a finding of
 18 diligence and offers no reason for a grant of relief." *Johnson v. Mammoth Recreations, Inc.*, 975
 19 F.2d 604, 609 (9th Cir. 1992). "Where the moving party has not been diligent, the inquiry ends,
 20 and the motion should be denied." *Hill v. Goodfellow Top Grade*, 2019 WL 2716487, at *2
 21 (quoting *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002)).

22 "Although the existence or degree of prejudice to [Google] might supply additional
 23 reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking
 24 modification." *Johnson v. Mammoth Recreations*, 975 F.2d at 609. Nevertheless, contrary to the
 25 assertions in the motion, the "notion [that a litigant] will not be prejudiced if it has to conduct
 26 additional discovery is meritless." *Philadelphia Indem. Ins. Co. v. Danco Builders*, No. 15-CV-
 27 03945-WHO, 2017 WL 24755, at *4 (N.D. Cal. Jan. 3, 2017). "[T]he need for a party to conduct
 28 supplemental discovery or to consider a new line of legal argument are classic sources of

1 prejudice that have regularly proven sufficient to defeat a motion for leave to amend” under the
 2 same good cause standard, and courts frequently combine the good cause analysis on such
 3 motions. *Id.*; *see also Aciri v. Int’l Ass’n of Machinists & Aerospace Workers*, 781 F.2d 1393,
 4 1398–99 (9th Cir. 1986) (holding no good cause to amend pleadings and enlarge discovery period
 5 because “allowing amendment would prejudice the [defendant] because of the necessity for
 6 further discovery.”).

7 **B. Plaintiffs cannot secure an extension based on their own failure to raise issues**
 8 **to the Court in a timely manner.**

9 Where a litigant moves to extend the discovery cut-off, the first question this Court asks is
 10 why they weren’t able to complete discovery within the Court-ordered deadline. Where courts find
 11 that a litigant could have completed discovery within the deadline through reasonable diligence,
 12 the motion fails. *See, e.g., Keck v. Alibaba.com Hong Kong Ltd.*, No. 17-CV-05672-BLF, 2019
 13 WL 2029072, at *1 (N.D. Cal. May 8, 2019) (denying motion to amend scheduling order to
 14 extend discovery four and a half months because Magistrate Judge’s discovery orders left room to
 15 diligently complete discovery within existing deadlines); *Philadelphia*, 2017 WL 24755, at *4
 16 (finding no good cause for amendment and schedule extension where plaintiff failed to raise issues
 17 it knew about for a year and a half, until nearly the close of discovery because “new theories are
 18 not reviewed favorably when the facts and the theory have been known to the party seeking
 19 amendment since the inception of the cause of action”); *Jacobson*, 2015 WL 2061712, at *4
 20 (finding no good cause where plaintiff was “aware of her potential alter-ego and veil-piercing
 21 theories” months before the deadline to amend pleadings, and waited “nearly three months” after
 22 the defendant’s document production to move the Court).

23 Here, Plaintiffs point to a single reason for why, in their view, they haven’t been able to
 24 complete discovery: because Google has produced “hardly any documents” and has not finished
 25 producing them.² Mot. at 11. As discussed above, Google will complete document production

26 ² Plaintiffs say that Google’s production here is inconsistent with the number of documents
 27 Google has produced in a different case dealing with different issues before different judges, and
 28 where the very same Plaintiffs’ counsel have engaged in regular discovery motion practice when
 they have wanted to pursue ripe discovery disputes. The argument makes no sense. There is no

1 with ample time left in discovery for depositions. The one-month extension this Court granted
 2 already is the same extension Google offered Plaintiffs as a courtesy in the run-up to this motion,
 3 but they refused that offer. As for documents Plaintiffs believe Google should have but has not
 4 produced, there are no such documents. And unless and until Judge Tse orders otherwise, there
 5 won't be. If Google is ordered to produce significantly more documents, it will revisit the case
 6 schedule with Plaintiffs..

7 For purposes of *this* motion, there can be no question that Plaintiffs have not been diligent.
 8 The issues Plaintiffs complain about are issues Plaintiffs chose not to present to the Court until
 9 now, near the close of discovery, despite knowing about them for months. That is textbook lack of
 10 diligence. Where a plaintiff has “waited to serve discovery requests and to attempt to resolve
 11 discovery disputes until the last minute,” courts do not hesitate to find a lack of adequate
 12 diligence. *Harper v. Lugbauer*, No. 11-CV-01306-JST, 2013 WL 3938699, at *2 (N.D. Cal. July
 13 29, 2013), *aff'd*, 709 F. App'x 849 (9th Cir. 2017). In *Harper*, the discovery period had been open
 14 for a year and was about to close when the plaintiff sought to enlarge the discovery period and
 15 seek discovery relief. The Court found a lack of diligence there, just as it should here.

16 As for Plaintiffs' supposed discovery disputes, “[t]o the extent that Plaintiff[s] legitimately
 17 believed that [Google] was obstructing [their] efforts to obtain relevant discovery, it was
 18 incumbent upon Plaintiff[s] to *expeditiously* seek relief from the Court to ensure that [they] would
 19 be sufficiently prepared for trial within the time-frame set by the Court.” *Schaffner v. Crown*
 20 *Equip. Corp.*, No. C 09-00284 SBA, 2011 WL 6303408, at *2 (N.D. Cal. Dec. 16, 2011); *see also*
 21 *Cotton, ex rel. Ngondji v. City of Eureka, Cal.*, No. C 08-4386 SBA, 2010 WL 2382255, at *2
 22 (N.D. Cal. June 10, 2010) (refusing to extend discovery where, “[g]iven the alleged significance
 23 of the decedent medical records, it was incumbent upon Defendants to have sought this
 24 information at the outset of the case, rather than waiting until the close of discovery”). *Osakan v.*

25
 26 rational reason for the same Plaintiffs' counsel to have secured hundreds of thousands of
 27 documents in one case and tens of thousands in another from the same defendant, other than that
 28 the cases are different. Given the case-specific nature of this motion, the Court should disregard
 Plaintiffs' argument.

1 *Apple Am. Grp.*, No. C 08-4722 SBA, 2010 WL 1838701, at *3–4 (N.D. Cal. May 5, 2010)
 2 (refusing to substitute new plaintiff and expand discovery period because “Plaintiff should
 3 promptly have taken appropriate steps to resolve the dispute and/or seek to join or substitute
 4 himself with an appropriate class representative or representatives. Instead, Plaintiff persisted in
 5 claiming that the Settlement Agreement is irrelevant and waited until the discovery cut-off and eve
 6 of trial to join additional representatives in the event he is found to lack standing.”). Here, they did
 7 not do that:

- 8 • Google began producing custodial ESI in July and completed it on September 8
 9 (before Plaintiffs demanded more search terms). There is no reason why Plaintiffs
 10 could not have moved the Court to compel more custodians then, but they didn’t.
- 11 • Google informed Plaintiffs at the outset of the case that it would not preserve
 12 hundreds of billions of raw event-level GA for Firebase data because it was
 13 unnecessary and doing so would be unreasonably burdensome and disproportionate
 14 to the needs of the case. They chose to wait to file a motion to compel on this issue
 15 until now, a year later.
- 16 • Google has worked with Plaintiffs to run as many of their search terms as possible,
 17 resulting in a massive list of search terms targeted at every conceivable relevant
 18 issue in the case. Google ran those terms, but it has steadfastly refused since March
 19 to run broad product-name terms like “WAA” against the custodial files of people
 20 who primarily work on the product. Yet Plaintiffs did not move to compel Google to
 21 use such broad search terms until now.
- 22 • Google has never agreed to produce source code in this case. To date, Plaintiffs have
 23 never moved to compel it, though they announced two days ago that they *might*.
- 24 • Plaintiffs claim there are “RFP-specific” disputes on which they *may* move to
 25 compel, but they don’t identify any RFP in particular. Since Google does not know
 26 what they intend on this score, it cannot respond, other than to say that its position
 27 on Plaintiffs’ RFPs has been known for a very long time. Recently, Plaintiffs,
 28 apparently realizing they had let their earlier RFP sets stagnate, served another set of
 document requests that closely mirrored already-existing document requests. Google
 timely objected to this effort to duplicate discovery. To date, Plaintiffs have neither
 served nor filed any motion to compel on this as-yet undisclosed discovery dispute.

25 This Court should be skeptical, as others are, of motions to compel filed at the close of
 26 discovery where the “plaintiffs knew from the outset what [the defendant]’s position was, and they
 27 had the option to do something about it,” but made a “conscious decision . . . not to bring the

1 matter to the court’s attention.” *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 331, 337 (N.D. Ill.
 2 2005). As the *Sulfuric Acid* court put it, “by consciously deciding not to file a motion to compel,
 3 the plaintiffs acquiesced” to the defendant’s position. *Id.* Just as there, here, Plaintiffs “cannot be
 4 heard to complain now about the conscious decision they made not to bring the matter to the
 5 court’s attention.” *Id.* To grant this motion would be to “reward[Plaintiffs] for the kind of
 6 purposeful delay exemplified by the[m] in this case.” *Id.*; *see also Krzyzanowski v. Orkin*
 7 *Exterminating Co.*, No. C 07-05362 SBA, 2009 WL 4573318, at *1 (N.D. Cal. Dec. 1, 2009) (“To
 8 the extent that Plaintiffs believed that Defendants were interfering with the discovery process,
 9 thereby impeding their ability to file a motion for class certification, it was incumbent upon
 10 Plaintiffs to seek relief from the assigned discovery magistrate—as opposed to waiting until after
 11 the close of discovery to seek yet another continuance of the trial date.”).

12 The only other issues raised by Plaintiffs fall into the different category of issues that are
 13 highly unlikely to affect the case schedule:

- 14 • Plaintiffs’ motion to compel a clawed back document applies to a single document.
- 15 • Any motion Plaintiffs may have concerning Google’s November 2 privilege log can
 16 be expeditiously presented to the Court for resolution. Experience dictates it is
 17 highly unlikely any privilege log-related ruling will imperil the case schedule.
- 18 • There is no “deposition issue.” The parties have worked out a framework for
 19 proceeding with depositions in a manner that aims to ensure individuals need only
 testify once, even if they are designated as Rule 30(b)(6) deponents.

20 Finally, Plaintiffs claim they were diligent in this case because, near the start of the
 21 discovery period in the March through May time period, they filed four discovery letter briefs with
 22 Judge Tse. Mot. at 8 n.1 (citing ECF Nos. 74, 75, 105, 110). But of those, the only issue on which
 23 Plaintiffs won was a Court-ordered production of documents from a litigation in Arizona dealing
 24 with WAA, and Google completed that production on April 20, 2021. Since then, Plaintiffs have
 25 not sought, nor obtained, any relief from Judge Tse. This motion and the most recent discovery
 26 letter briefs were borne of time anxiety, once Plaintiffs realized that Google had reached the end
 27 of its document production and was prepared to schedule depositions. That is no basis for
 28

1 extending the case schedule.

2 **C. Plaintiffs are not in the dark about Google’s defenses.**

3 The Motion asserts that it is “axiomatic that where the pleadings are unsettled, good cause
4 generally exists for a modification of the scheduling order.” Mot. at 14:10-11. There is no such
5 rule. The only authority Plaintiffs cite for that proposition is a decision in which the Court found
6 that new discovery at the end of the discovery period revealing new theories of the case justified a
7 late amendment to the pleadings and extension of the discovery period. *Applied Med. Res. Corp. v.*
8 *Tyco Healthcare Grp. LP*, No. SACV 11-1406 JVS (ANx), 2013 WL 12472050, at *3 (C.D. Cal.
9 Jan. 14, 2013) (finding good cause to extend discovery where “new allegations [were] based on
10 facts obtained and confirmed during discovery which took place after the scheduling order’s
11 deadline for amended pleadings”). Nothing in that case stands for the proposition for which
12 Plaintiffs cite it, and there can be no question that Plaintiffs did not discover anything new during
13 discovery that would justify extending the discovery schedule. To the contrary, Plaintiffs’ motion
14 is based on a desire to take additional discovery on theories of the case that were known or should
15 have been known to them when the case was filed. *See Design Data Corp. v. Unigate Enter., Inc.*,
16 No. 12-CV-04131-WHO, 2014 WL 4477244, at *3 (N.D. Cal. Sept. 11, 2014), *aff’d*, 847 F.3d
17 1169 (9th Cir. 2017) (finding lack of diligence where moving party “had knowledge of the
18 majority of the facts it claims supports its motion” a year earlier).

19 Nevertheless, to address this concern, Google offered to provide Plaintiffs a list of its
20 affirmative defenses, which will not surprise Plaintiffs. Santacana Decl. ¶ 27. Plaintiffs did not
21 accept that offer. And regardless, Plaintiffs should wait to see Google’s Answer before assuming it
22 will require *six months* of extra discovery. Google predicts it will require *none*; the parties are
23 well versed in their disagreements over the facts and the law in this case, having litigated it for a
24 year and a half.

25 Plaintiffs also fault Google for continuing to move to dismiss. The same could be said of
26 Plaintiffs, who have delayed resolution of the pleadings by switching theories after every motion.
27 Plaintiffs chose not to oppose Google’s first motion. After the second motion, Plaintiffs dropped
28 their “secret scripts” and Wiretap Act claims and added new AdMob and Cloud Messaging

1 theories and a new breach of contract claim. After the third motion, Plaintiffs dropped their
2 original contract claim and supplanted it with a new one, along with a CIPA claim that contains
3 the same fatal deficiency as the prior iteration. The only reason the pleadings aren't settled is that
4 Plaintiffs failed to plead all their claims and theories from the start and have amended contrary to
5 the Court's directives.

6 **D. Google has always made its position on extending the case schedule clear.**

7 The motion claims that Google executed a bait and switch, agreeing to a case extension
8 with a promise for a larger one once the Court ruled on the motion to dismiss the Second
9 Amended Complaint. As discussed *supra*, § II.B., that's not true. Google made clear by phone and
10 in a redlined draft of the joint stipulation extending the case schedule two months that it would
11 consider any further extension based on the situation then present. The Court ruled on that motion
12 to dismiss five days after the stipulation was filed, on August 18, 2021. Plaintiffs did not raise the
13 issue of extending the case schedule again until over two months later, and only because Google
14 attempted to move the discovery ball forward by voluntarily offering deposition dates for three
15 percipient witnesses and the Rule 30(b)(6) deposition.

16 The irony here is that Google, the defendant, is not asking for a case extension, it has
17 offered depositions of its witnesses, it has offered a Rule 30(b)(6) deposition, and it has noticed
18 Plaintiffs' depositions, all in a timely manner. Plaintiffs, who usually would prefer a shorter case
19 schedule, are the ones seeking delay, even as they accuse Google of delaying. To the extent
20 Plaintiffs are jammed now, it's their fault, not Google's.

21 **IV. CONCLUSION**

22 Because Plaintiffs were not diligent during the discovery period in raising the issues they
23 now say justify extending the case schedule, this motion should be denied. Denial is also
24 supported by the fact that extending the case schedule would prejudice Google, though such
25 prejudice is not necessary to deny the motion.

Dated: November 12, 2021

Respectfully submitted,

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By: /s/ Eduardo E. Santacana

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